Court on May 17, 1978 wherein a request to pay a sum of $48.50 was made. This sum was paid to the Registrar on the same day. On May 18, 1978 he returned the appeal record to the Registrar because the appellant's bundle of documents dated April 4, 1978 had not been included in the appeal record. On June 12, 1978 the appeal record was completed whereupon a further sum of $29 was paid to the Registrar and on June 17, 1978 a copy of the memorandum of appeal and appeal record were posted to the respondent and these were received by the respondent on June 19, 1978. Mr. Devadason stated further in his affidavit that the appellant had a good chance of succeeding in the appeal on the merits of the case. He said that as the appeal record was ready only on June 12, 1978 the date on Form 40 should read June 12, 1978 and not May 17, 1978. He said that in the peculiar circumstances of the case an extension of time should be granted in terms of the notice of motion.

Order 59 rule 4(3) reads as follows: —

"If the memorandum of appeal is not filed or is not served within the prescribed time and no sufficient ground is shown for the delay the appeal may be dismissed."

The learned judge held that Mr. Devadason's affidavit showed no sufficient ground for the delay in serving the memorandum of appeal and the appeal record on the respondent. He found, and with respect we agree that many rules relating to civil appeals from subordinate courts to the High Court had been disregarded.

That part of his Lordship's judgment is set out in extenso:

"First of all the memorandum of appeal was filed prematurely in the High Court on May 10, 1978. The memorandum was required to be filed not before but within fourteen days after service of Form 40 on May 17, 1978. In a sense therefore no memorandum of appeal was properly filed in the High Court — the one filed on May 10, 1978 served no purpose as it was not filed pursuant to any rule of procedure. Secondly the memorandum of appeal and the record of appeal which should have been served on the respondent on or before May 31, 1978 were not served until June 19, 1978. Mr. Devadason's excuse for this delay cannot be accepted. He said he could not serve the memorandum of appeal and the appeal record within time because he had not received back the appeal record with the inclusion of appellant's bundle of documents until June 12, 1978. Even if he thought that he had a good reason for not serving the appeal record in time Mr. Devadason certainly had no excuse for not serving the memorandum of appeal on the respondent within the prescribed period. Thirdly it was quite wrong on the part of counsel to have returned the appeal record to the Registrar of the Sessions Court for the purpose of including the appellant's bundle of documents. This bundle should not have formed part of the record at all. The bundle was dated April 4, 1978 but the Sessions Court file shows that it was filed on April 15, 1978 so that when the final order of the Sessions Court was made on April 7, 1978 this bundle was not before the Court and was therefore not considered by the learned President nor did the respondent have an opportunity to agree or disagree with it. Lastly there was a failure to comply with Order XXXIX rule 2(6) of the Subordinate Courts Rules because the notice of appeal was not served on the substituted defendant Haji Alwi bin Abdullah. This rule required the appellant to serve the notice of appeal on all parties directly affected by the appeal and it cannot be denied that the substituted defendant was very much affected by the appeal and he ought to have been served with the notice of appeal. This defect was eventually rectified. Mr. Devadason relented from his earlier stand and had the whole appeal record which included the notice of appeal served on the substituted defendant a few days before the appellant's application for extension of time came up for hearing."

The decision as to what constitutes sufficient ground for the delay necessarily involves the exercise of judicial discretion. In this court, on an application for special leave to appeal out of time, the mistake of a legal adviser has been held to be not a sufficient ground for granting special leave (see *Chong Kueng Ying & Ors.* v. *Lovis Lavagna*[3]). Similarly it was held in *Chin Hua Sawmill Co. Sdn. Bhd.* v. *Tuan Yusoff bin Tuan Mohamed*[4] that the failure to serve a notice of appeal on the respondent within the prescribed period owing to a mistake of a solicitor was not a ground for granting special leave.

What Thomson C.J. said of judicial discretion in *Veerasingam* v. *Public Prosecutor,*[5] though that was a criminal reference, applies with equal force to matters of civil procedure, and we quote: —

"Clearly, to exercise his discretion properly the judge must apply his mind to all the relevant material. He must consider the circumstances of the original trial. He must consider the original Petition of Appeal. And he must consider the circumstances which are now urged upon him to induce him to allow any departure from or addition to that original Petition of Appeal. He must consider his own powers as to such matters as the granting of adjournment and the requiring of Notice to be given. And then he must exercise his discretion as he sees fit in order that substantial justice may be done in the matter. It may be that he may find it helpful to look at what has been done in some other case by some other judge but if he does he must be careful to look at what that other judge has done merely as an illustration and not as laying down any judicial precedent."

With respect we agree with the learned judge that no sufficient ground has been advanced for the delay as to incline him to exercise his discretion in favour of the appellant.

The appeal is accordingly dismissed with costs.

Appeal dismissed.

Solicitors: *D.A. Devadason; N. Ramachandran & Co.; Goh Soot Hwang & Co.*

JOHARA BI BINTE ABDUL KADIR MARICAN v. LAWRENCE LAM KWOK FOU & ANOR.

[F.C. (Lee Hun Hoe C.J. (Borneo), Chang Min Tat & Syed Othman F.JJ.) September 10 & October 13, 1980]
[Kuching — Federal Court Civil Appeal No. 50 of 1980]

Evidence — Payment of balance of purchase price for land sold — Whether paid to vendor's husband — Inference from facts — Burden of proof — Whether burden shifted.

Contract — Sale of land — Payment of balance of purchase price — Burden of proof.

In this case the appellant claimed the sum of $135,000 the balance of the purchase price of the appellant's property which she had sold. The 1st respondent said that he had paid the money to the appellant's husband, who acted as agent for her. The appellant's husband denied receiving the money. The learned trial judge was not impressed with the evidence of the 1st respondent who was a bank manager, but he held that it was all a matter of proof, that the appellant had not proved her case and therefore the burden had not passed to the respondents to disprove it. He held that the evidence of the appellant's husband had erased whatever preponderance there was in the appellant's favour, in the result that the evidence on both sides became evenly balanced and that a satisfactory conclusion could not be arrived at. The appellant appealed.

Held: (1) the decision of the learned trial judge was reached via an inference drawn from a serious error of fact and in drawing this inference he had not merely considered evidence which was not established but had failed to take into account the probative value of evidence which had been proved or was common to both parties;

(2) in the circumstances the inference he drew could not be sustained and the appellate court must come to the view, on the question of onus of proof, that the appellant had on a balance of probabilities, discharged the onus on her, the burden then shifted to the respondents and as the respondents had not discharged the burden even on a balance of probabilities, there should be judgment for the appellants.

Cases referred to:-

(1) *Sime Darby & Co.* v. *Official Assignee* A.I.R. 1928 P.C. 77.

(2) *Abrath* v. *N.E. Railway Co.* (1883) 11 Q.B.D. 440.

(3) *Wong Chong Chow* v. *Pan-Malaysian Cement Works Berhad* [1980] 2 M.L.J. 75.

FEDERAL COURT.

K.C.I. Reddy (*John Ko* with him) for the appellant.

Patrick Tan (*Goh Lian Chua* with him) for the respondent.

Cur. Adv. Vult.

Chang Min Tat F.J. (delivering the judgment of the Court): The appeal is concerned with one central issue of fact, the payment of the balance of $135,000 for the purchase of the appellant's property by Lawrence Lam Kwok Fou, the first respondent. The appellant says she has not been paid this sum and makes claim for it. Lawrence Lam says he has paid the money to Yakub, the appellant's husband, who has at all relevant times acted as agent with the authority of the appellant. Yakub denies that he has received this sum. The trial judge found for the respondent-purchaser and the vendor now appeals to this court. The 2nd respondent the party to whom the property was transferred and who was thus clearly the sub-purchaser has been joined in the action, and no objection was ever taken to this joinder.

The trial of this simple issue of fact had been complicated by the somewhat remarkable failure of Lawrence Lam to obtain any receipt from either the appellant or Yakub and remained thus to be solved by oral evidence. Lawrence Lam who was at all relevant times the manager of Kwong Lee Bank of Kuching, was a man who must be taken to be used to dealing with money and who must know that the safety in any financial transaction for the payer lies in a receipt from the payee or the payment by means of a crossed cheque made non-negotiable and payable only to the payee's account and the subsequent payment into the payee's bank account of this cheque. But he said that he did not get any receipt or even attempt to get one from the appellant or her husband to whom he paid this sum not because of mental aberration or forgetfulness but because, to quote his own words, "it is not unusual to pay this large sum without receipt." So here is a bank-manager who clearly did not think a receipt of any material importance and therefore it was usual for him to pay over large sums in cash without demanding proof of receipt. This was the evidence which the learned trial judge found unsatisfactory and he said so clearly, but he held that it was all a matter of proof, that the appellant had not proved her case and therefore the burden had not passed to the respondents to disprove it.

Before dealing with the question of proof, it is necessary to consider the circumstances attending on the sale.

The appellant's property was sold for $300,000 of which $75,000 was to be paid by an exchange of a house at this agreed valuation. The amount to be paid in cash was therefore $225,000. At this time, the appellant's husband Yakub was a customer of Kwong Lee Bank and was given overdraft facilities. The appellant's property had been charged to the Bank to secure the repayment of the sum due on this overdraft. On April 7, 1971, the exchange of properties took place, that is, transfers were executed. The appellant executed a transfer of her property at a stated consideration of $300,000 to the 2nd respondent, as sub-purchaser. Lawrence Lam was a director of this company. A transfer of a house was executed to the appellant. No money passed. On this date, Yakub's account with the Bank was in debit to the extent of $95,882.77. To give effect to the transfer of the appellant's property to the 2nd respondent, the Bank (clearly on the instructions of its manager Lawrence Lam) executed a discharge of the charge. But on this day and for a month thereafter, no money was paid to repay the overdraft at all or even in part. Despite this fact, the security for the overdraft was allowed by a deliberate act of the manager, Lawrence Lam, to be released.

Lawrence Lam's stewardship of the Bank's finances must speak volumes against his reliability. This stewardship must be seen to be all the more remarkable when the statement of defence in paragraphs 3(c) and 6 is set against his oral evidence.

This paragraph 3(c) says that the $225,000 was agreed to be paid by the payment of $95,000 into Yakub's account, $40,000 in cash to him and the remaining $90,000 on vacant possession being given. This appears straightforward but it will be seen that it is not. The least one would expect the Bank by its manager, Lawrence Lam, to demand and agree to would be the immediate repayment of the overdrawn account, to be followed, perhaps, by the withdrawal or cancellation of the overdraft facilities — a demand which the Bank was in a position to make since without it executing a discharge of the charge, the sale could not go through. The assumption underlying this arrangement would be that the account was not overdrawn beyond $95,000. In fact, on the day of the execution of the transfer, when $135,000 was alleged to have been paid to Yakub, it stood at somewhat in excess of this figure. We therefore find it difficult to understand, even if it be a fact that Yakub made it a condition for the payment to him in cash of this large sum of $40,000, why this money should not be paid into his account with the Bank which would then be in credit if the $95,000 for the discharge of the charge had also been paid in. The payment into the bank account would be unchallengeable evidence of payment and the money would be as readily and easily available to Yakub as cash put

into his hands. But if in fact, he insisted on the money being paid to him directly without it passing through his Bank account, we find it even more difficult to understand why an experienced gentleman like Lawrence Lam did not get a receipt for the amount actually paid. But, of course, we have his reason — it was not unusual for him. It was by any account a most unusual reason.

If the agreed terms were (partial) discharge of the charge by the payment into the Bank account of $95,000, payment of $40,000 in cash to Yakub and the retention of $90,000 until vacant possession be given, as averred in this paragraph 3(c), what actually happened? The defence said that there was a variation. Paragraph (6) of the statement of defence averred that

"... The defendants paid the said sum of $95,000 together with the sum of $40,000 in cash to the plaintiff's husband as attorney for the plaintiff *in the presence of the 2nd defendant company. The $95,000 was not paid by the plaintiff's husband into his account in Kwong Lee Bank for the discharge as formerly agreed.* This was done pursuant to the request of the plaintiff's husband, as attorney for the plaintiff, who said *they wanted to bring the money to India* and authorised the 1st defendant to pay the last instalment of $90,000 towards the discharge of the charge." (Emphasis supplied).

Now this variation in the terms for the payment was one which the defence accepted was readily agreed to by Lawrence Lam and without demur, the money was paid to Yakub. The Bank executed the discharge, thereby removing the only security it ever had for the money lent. The balance now available to pay off the mortgage was $90,000; the debit in Yakub's account with the Bank was in excess of $95,000 and increasing since the overdraft facilities remained available and Yakub was allowed to continue drawing on this overdraft and interest would accumulate daily. On May 6, 1971 the overdraft amounted to $102,443.67. Yet in these circumstances, the Bank manager said and these are his own words, "it is not unusual to pay him cash though his account stood in the red." He gave no reason why he agreed to this variation in the terms of payment which put the Bank at such risk not only because the remaining funds were insufficient but also because they were not payable until vacant possession was given and there was no guarantee or certainty when such vacant possession would be given.

Paragraph (6) of the statement of defence is vague. It did not say when and where the two sums of money were paid. One would normally have expected the payment to be made by the solicitors or into Yakub's account. The oral evidence of Lawrence Lam clarified that it was at his own office in the Bank and before the execution of the transfer. The record of his oral evidence in cross-examination is as follows:

"Yakub (the appellant's husband) came to see me before signing the document of transfer to have settlement of the negotiation at my bank at about 11.00 a.m.

I paid him on the spot. I paid him $100 and $1,000 dollar notes. I have no receipt for this payment. It is not unusual to pay this large sum without receipt.

I paid him from my own personal money. I could not pay from company's money until full discharge of the land to the bank.

Defendant 2's company has an account with Kwong Lee Bank and another bank.

(Witness referred to paragraph 6 of statement of defence). The $300,000 fully paid on agreement refers to agreement not document of sale. The premises of the defendant's company was at Jalan Mendu but charged to the bank. Cannot remember when it was charged. Agree the payment was made at the bank.

Payment of $300,000 was authorised by the Board of Directors. I can produce the balance sheet of the company.

There were 3 directors in 1971. Myself, my wife and Datuk Sim Kheng Hong.

Agree the purpose of the sale of his land was to pay his overdraft. It is not unusual to pay him cash though his account with the bank was still in the red.

No other witness to payment except Ho Eng Choo."

Earlier on, Lawrence Lam had testified in examination in chief that Yakub wanted $135,000 to be paid to him in the presence of this Mr. Ho.

Now, Mr. Ho was in no way connected with the 2nd respondent company and therefore the payment was not made "in the presence of the 2nd defendant company" (whatever that means) as averred in paragraph (6) of the statement of defence, unless there was some other person present. Mr. Ho was the owner of the house which was to be transferred to the appellant and appeared to have no connection whatsoever with the transaction between the appellant and Lawrence Lam. So why was Yakub said to have insisted on the presence of Mr. Ho? It happened that Mr. Ho died before the case came to trial and his evidence, if any, is now lost to the court. Lawrence Lam suggested to Yakub in cross-examination that he was brought to see him by one Koh Eng Choo which Yakub denied but if it was his instruction to his counsel that this Koh Eng Choo was there, why did he deny that besides Ho there was no other person present?

Lawrence Lam's account of what happened on the morning of the transfer and discharge leaves us with the following unanswered queries. There was a solicitor acting for both parties. Perhaps it is more correct to say that he acted for the Bank and the appellant did not engage any other solicitor. On the day fixed for the execution, no money was given by the purchaser to his solicitor to pay the vendor. No reason was shown why the $40,000 to be paid to Yakub on the execution should not have been paid through the solicitor for the purchaser and it be explained to the vendor that $95,000 would be paid into her husband's account and $90,000 retained until vacant possession was given. And should not in the meantime this $90,000 be paid over to a stakeholder as earnest for the payment? Furthermore, when the execution was fixed for the afternoon of April 7, 1971 and the terms were agreed as set out in paragraph 3(c) of the statement of defence, *supra*, the visit of Yakub to the office of Lawrence Lam in the morning must come as a surprise to the latter and yet not only was there not the slightest murmur from him over this variation of the terms of payment which increased the risk of his employers in the settlement of the overdraft but he had ready and available for immediate payment this not inconsiderable sum of $135,000 in cash.

The reason advanced by Lawrence Lam for the demand of cash payment by the appellant's husband

was that "he wanted the money to go to India and some for his wife." For ourselves we fail to see why if this was the reason, the money could still not be paid into the account. It was certainly not for Exchange Control reasons. And the fact is, firmly established from his passport, the appellant's husband did not leave for India until a good eighteen months later, until September 8, 1972.

The evidence of Lawrence Lam was rejected by the learned trial judge in these words "although it may not be unusual to pay a large sum of money without obtaining (a) receipt, but, in our view, this is not the practice especially among bankers who are more concerned with monetary transactions." It strained his credulity as it does ours. He accepted the evidence of the appellant whom he found to be honest and trustworthy. Her oral evidence was entirely that her husband did not bring back the $135,000 said to have been paid to him at his request. But the learned trial judge did not quite believe the evidence of Yakub. He thought, relying on *Sime Darby & Co.* v. *Official Assignee*[1] and *Abrath* v. *N.E. Railway Co.*,[2] *per* Brett M.R. at page 452 that it was all a matter of proof and that until and unless the plaintiff had discharged the onus on her to prove her case on a balance of probabilities the burden did not shift to the defendant and no matter if the defendant's case was completely unbelievable, the claim against him must in this circumstance be dismissed.

With respect, we agree with this judicial approach. We ourselves have in *Wong Chong Chow* v. *Pan-Malaysian Cement Works Berhad*[3] considered that difficult questions of fact could often be resolved by considering the burden of proof.

It remains therefore to consider whether the learned judge was right in holding as he did that the appellant had not discharged the onus of proof which at first lay on her to prove that the money had not been paid so that the burden had not shifted to the respondents. If he was wrong and this court on well-established principles has to overrule him, then inevitably it will mean that on his assessment of Lawrence Lam's testimony, the respondent had not discharged this burden and the appeal must be allowed.

In the events that happened, the appellant and her husband had on August 16, 1971 charged the newly acquired property to Kwong Lee Bank to secure an overdraft facility for $25,000. On December 23, 1971, Yakub wrote for another overdraft of $10,000. The learned trial judge considered this evidence inconsistent with the claim that the $135,000 had not been paid; he asked himself why, if in fact $135,000 was due to him from the Bank, had Yakub to ask for more loans? He clearly bore in mind in respect of the second charge the fact that "no mention was made on the balance of $135,000 allegedly due to him from the Bank" and in respect of the request for a clean overdraft, the fact that "again no mention was made at that early date on the alleged balance of payment due to him from the bank." And on these two facts, he drew the inference that the $135,000 had been paid over to Yakub and he came to the conclusion that the appellant, through Yakub, had not proved her case.

Now it has been said that in the matter of drawing inferences from facts found, an appellate court is in as good a position as the trial judge. It is obvious that here the learned trial judge had made a fundamental error on the facts and this inference he drew was therefore wrong. The balance of $135,000 claimed to be due because unpaid was owing not by the Bank which was not the purchaser but by Lawrence Lam who had emphasised throughout his evidence that in the matter of the purchase of the appellant's property, he was acting in a personal capacity and was purchasing the property not for the Bank but for the 2nd respondent. There was never at any time any allegation, least of all in Yakub's mind, that any money was due to his wife from the Bank.

The financial standing of Yakub in the Bank was clear. Whatever his expectations of money might be, he in 1971 and 1972 owed the Bank money on his original overdraft, which he had not cleared despite the discharge of his wife's property and if he needed more money and the Bank was his only source of loan, he had either to provide another security in the form of a charge on his new property or to ask for a clean overdraft. If he had been paid what he said was owed to his wife, there would have been no necessity for either of these two eventualities. His continued impecuniosity at a time when his wife's property was sold is evidence more in favour of than against his claim that he had not received the $135,000. At that time he was not about to go to India and there was no necessity to remit any money there. The fact that when he eventually went to India he did so with only $300, in our view and with respect, was further proof that he had not been paid rather than, as held by the learned trial judge, proof that he had been paid.

In our view, too, the evidence at the trial must be considered with regard to the fact that the appellant was an illiterate and absolutely inexperienced, Yakub the husband perhaps not so illiterate but without any English whereas Lawrence Lam was versed in English and in commercial and financial techniques, though he professed that it was not "unusual" for him not to follow them.

The learned trial judge considered that Yakub's evidence had "erased whatever preponderance there was in the (appellant's) favour, in the result that the evidence on both sides becomes evenly balanced and that satisfactory conclusion could not be arrived at." Hence his reliance on onus of proof. But quite clearly, his decision was reached via an inference drawn entirely from a serious error of fact and in drawing this inference, he had not merely considered evidence which was not established but had failed to take into account the probative value of evidence which had been proved or was common to both parties. In these circumstances the inference he drew cannot be sustained and this court can and must come to the view, on the question of onus of proof, that the appellant had on a balance of probabilities, discharged the onus on her, the burden then shifted to the respondents and as held by the learned trial judge,

the respondents had not discharged the burden even on a balance of probabilities and there should have been judgment for the appellant.

The appeal is, therefore, allowed with costs here and in the court below. Judgment will be entered for the appellant in the sum of $135,000 against both parties with interest thereon at 6% from April 7, 1971 to date of payment.

Appeal allowed.

Solicitors: *Battenberg & Talma; Yong & Co.*

HOCK HUA BANK BHD. v. SAHARI BIN MURID

[F.C. (Lee Hun Hoe C.J. (Borneo), Chang Min Tat & Syed Othman F.JJ.) September 10 & October 13, 1980]
[Kuching — Federal Court Civil Appeal No. 53 of 1980]

Practice and Procedure — Jurisdiction of judge to alter judgment regularly obtained and perfected — Judgment inter partes — Allegation of fraud — Judge functus officio — Fresh action necessary to set aside judgment — R.S.C., 1957, O. 28, r. 11 (R.H.C. 1980, O. 20 r. 11).

In this case the learned judge had made an order for sale in a foreclosure proceeding. The order was made after hearing all the parties and was made despite a claim of *non est factum* and allegations of fraud and forgery by the respondent. The order was drawn up and perfected. There was no appeal against it. The respondent applied to set aside the judgment and this application was refused. Subsequently the respondent applied again to set aside the previous orders. The learned judge thereupon set aside his order. The appellant appealed.

Held: (1) the learned judge was *functus officio;*

(2) the court had no power under any application in the same action to alter vary or set aside a judgment regularly obtained after it had been entered or an order after it has been drawn up, except under the slip rule, so far as is necessary to correct errors in expressing the intention of the court, unless it is a judgment by default or made in the absence of a party at a trial or hearing;

(3) if a judgment or order has been obtained by fraud or where further evidence which could not possibly have been adduced at the original hearing is forthcoming, a fresh action will lie to impeach the original judgment;

(4) in this case the learned judge had no jurisdiction to set aside his own order and the original order must be restored, leaving it to the respondent to take out a fresh action to set aside the order on the ground of fraud.

Cases referred to:-

(1) *Evans* v. *Bartlam* [1937] A.C. 473.
(2) *Re St. Nazaire Co.* 12 Ch. D. 88.
(3) *Kelsey* v. *Doune* [1912] 2 K.B. 482.
(4) *Hession* v. *Jones* [1914] 2 K.B. 421.
(5) *Hip Foong Hong* v. *Neotia & Co.* [1918] A.C. 888.
(6) *Jonesco* v. *Beard* [1930] A.C. 298.
(7) *Smith* v. *Peizer* 65 S.J. 607.

FEDERAL COURT.

Peter Chin for the appellant.

Raymond Szetu for the respondent.

Cur. Adv. Vult.

Chang Min Tat F.J. (delivering the judgment of the Court): This appeal is concerned with the jurisdiction of a judge to alter, vary or set aside a judgment regularly obtained, drawn up and perfected.

The order in question was an order for sale made in a foreclosure proceeding. The originating summons was duly served on the chargor, together with copies of the charge and the notice of demand under section 148 of the Land Code which were annexed to the affidavit in support as exhibits. The charge was to secure the repayment of a loan made to a firm known as the Tukang Firma Perabut dan Binaan and appeared to be executed by a Sahari as chargor before an advocate and solicitor practising at Miri. It is to be observed that the identity card number of the purported chargor was not recorded on the charge.

The respondent to the foreclosure proceeding filed an affidavit in which he denied that he executed the charge on the day claimed and asserted that he could not have done so since on that day he was out at sea on board a boat, heading towards Kota Kinabalu.

The respondent also averred that he had issued out a writ against the proprietor or partner of the firm and the chargee Bank for a declaration that his land was freed from the charge and for consequential reliefs and damages.

This claim of *non est factum* and the charges of fraud and forgery in the counter affidavit of the respondent notwithstanding, the judge after hearing counsel for both parties made the order of sale on June 13, 1978. That order was then drawn up and perfected. It was not appealed against but shortly before the expiry of a month from the date of the order which was the period for lodging an appeal, the respondent made an application to set it aside and he also asked for leave to file an affidavit in opposition. The purpose of the last prayer is not easily understood. He had filed an earlier affidavit in opposition. It was as full as could be desired, except perhaps he did not exhibit copies of the various ship's documents which would establish that he was not in Miri at the time when he was said to have executed the charge in Miri. However he did additionally allege a meeting with the attesting solicitor who confirmed, so it was alleged, that the respondent was not the person who executed the charge.

The summons to set aside the first order was set before the learned judge on September 26, 1978. Counsel appeared for both parties. The various affidavits were read. The judge made an order dismissing it. His reasons have not been stated anywhere. But the opposition to the second summons was not on the question of the judge's jurisdiction but it was contended that the summons was not in compliance, presumably, with the rules. Whether the refusal of the judge to set aside this order was on this procedural ground, it is not possible to say.

Then on December 18, 1979, this time by notice of motion, the respondent made another application to set aside the two previous orders on precisely the same grounds. Again affidavits and counter-affidavits were filed. On this occasion, however, the argument of counsel for the respondent succeeded and the learned judge set aside his own order.

He did not consider that he was *functus officio.* Nor that the application to set aside the order was made in the same proceedings and after the order had been drawn up. He did not appear to realise that the order was made on an inter-partes application. He